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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

Nos. 804 and 805

KURT MERTIG AND ERNEST ELMHURST,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

P. BATEMAN EBNER,
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INDEX

Subject Index

	Page
Petition for writs of certiorari	1
Statement	2
Jurisdiction	6
Questions presented	6
Reasons for granting the writ	7
Prayer for writ	7
Brief in support of petition	9
Grounds on which jurisdiction of this Court is invoked	9
Specification of errors assigned	9
Summary of argument	10
Argument	10
Conclusion	26

Table of Cases Cited

Aron v. *City of Wausau*, 74 N. W. 354, 98 Wis. 592	22
Cantwell v. *State of Connecticut*, 310 U. S. 296	24
Commonwealth v. *Fleckner*, 167 Mass. 13, 44 N. E. 1053	11, 13
Dearborn Publishing Co. v. *Fitzgerald*, 271 Fed. 479	15
District of Columbia v. *Gardner*, 39 App. D. C. 389	14
Hanback v. *District of Columbia*, 35 At. (2d) 189	12
Hartwell v. *U. S.*, 107 F. (2d) 359	12
Marsh v. *State of Alabama*, Law Ed. Advance Opinions 1945-1946, Vol. 90 No. 6, P. 231	13
People v. *Edmonston*, 168 N. Y. Misc. 142	
People v. *Judson*, N. Y. 11 Daly 1, 83	24
People v. *Most*, 64 N. E. 175, 171 N. Y. 423	23
People v. *Nixon*, 248 N. Y. 182	19
Roby v. *State*, 96 Wis. 667, 71 N. W. 1046	13
Rosario St. Pierre v. *U. S.*, 319 U. S. 41, 87 L. Ed. 199	10, 11

Page

Schneider v. *Irvington*, 308 U. S. 147, 84 L. Ed. 155, 60 Sup. Ct. 146 25
Shields v. *State*, 204 N. W. 486, 187 Wis. 48, 40 ALR 945 22
State of Indiana ex rel. Juan S. Lopez v. *Alvina M. Kiligrew, et al.*, 174 N. E. 808 13

STATUTES CITED

American Jurisprudence, Vol. 2, Sec. 232 22
Article 1, Sec. 8, New York State Constitution 12

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PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Justices of the Supreme Court of the United States:

Petitioners, Kurt Mertig and Ernest Elmhurst, are seeking certiorari, in that, on August 23, 1946, they were denied leave to appeal their conviction to the Court of Appeals for the State of New York. It is contended that error was committed by the trial Court; that the convictions were contrary to the law and evidence, and in violation of the guarantees afforded by the First Amendment of the Federal Constitution, to the right of freedom of speech and to peaceably assemble.

Petitioners are at present free from sentence imposed as result of their convictions in that the same have been served, bond having been denied during the pendency of motions filed, and the appeal taken.

The respondent is the People of the State of New York.

Petitioners were convicted in the Court of Special Sessions, City of New York, Queens County Division, along with one Homer Maertz, of an alleged violation of Section 2092, Sub. 3, of the Penal Law of the State of New York entitled "Unlawful Assemblage" and which statute reads as follows:

> "Whenever three or more persons: Being assembled attempt or threaten any act tending towards a breach of the peace, or an injury to person or property, or any unlawful act; such assembly is unlawful, and every person participating therein by his presence, aid or instigation is guilty of a misdemeanor.
>
> "But this section shall not be so construed as to prevent the peaceable assembling of persons for lawful purpose of protest or petition."

Following convictions, they were sentenced on February 28, 1946, to a term of six months' imprisonment.

Statement

Petitioners, along with one Homer Maertz, were jointly charged with violation of the statute referred to above as "Unlawful Assemblage", the Information reading as follows:

> "The three defendants acting together and in concert on or about October 6, 1945, in the County of Queens did unlawfully assemble and did attempt or threaten an act tending toward breach of the peace or an injury to a person or persons or property; that said defendants did, in such unlawful assembly, participate thereby by their presence, aid or instigation as follows: that each and all of said defendants did then and there distribute, cause to be distributed and sold, inflammatory, malicious, false, mischievous and criminally libelous literature concerning alleged ritual murder practices of the Jewish people as a tenet of their reli-

gious faith, thereby exposing them to scorn, ridicule and contempt and tending to incite a riot, knowing full well that the charges contained in such literature were false in each and every respect and which literature was calculated to incite to violence against Jews, individually and collectively, and that said defendants did then and there say that they were able to prove that Jews participated in ritual murders."

The alleged unlawful assembly charged in the Information took place on October 6, 1945, at Springfield Boulevard and Jamaica Avenue, Queens Village, but the record is silent as to the nature of the surrounding neighborhood. There does not appear to have been any contention on part of the prosecution that the assembly in itself was unlawful, but only that petitioners distributed, or caused to be distributed at the meeting, certain literature which was alleged to have been inflammatory, malicious, false, mischievous and criminally libelous, and of such nature as to constitute an attempt or threat towards a breach of the peace. The meeting appears to have been conducted from beginning to end in an orderly and peaceful manner, and was supervised by three sergeants and thirty patrolmen from the police force (R. 88) and not one arrest was made by any member of the police detail (R. 89). The only disorders appeared to be interruptions of the speakers from what appears to have been an antagonistic audience (R. 90).

The meeting was organized by one Casimir Daniel Kurts, a leader of an organization known as the Christian Front, and who appeared as a witness for the prosecution. Notice of said meeting was distributed by Kurts, and was offered in evidence as People's Exhibit 1 (R. 37).

Both petitioners spoke at the meeting and were introduced by Casimir Daniel Kurts, the chairman. During the course of the meeting, certain literature was either distributed or sold by someone, and which articles were

offered in evidence as People's Exhibits 3, 4 and 5. The only evidence offered by the State that tended to associate petitioners with distribution of literature in question was the testimony of one Isaac Weinstock, and who stated he saw petitioners take copies of People's Exhibits 3, 4 and 5 from bags and give them to men and women for distribution (R. 62). No other witness appearing for the State testified that petitioners had anything to do with distribution of literature which constituted the crux of the charge.

Joseph A. G. Kellman, a witness for the State, identified certain literature which he stated was taken from bags by co-defendant Homer Maertz and handed to unidentified persons (R. 52). The Witness, Kellman, attended the meeting by virtue of his prior knowledge of the date and place where it was to be held, and his testimony is quite significant, in that he stated in substance that he had not seen anything illegal nor did he make an application for arrest of any person (R. 57). He further said he saw two persons arrested, one being defendant Homer Maertz, and the other, a Mr. Ginsberg, on a charge and counter-charge of disorderly conduct (R. 58). Following the arrests of Maertz and Ginsberg the witness Kellman went to the police station, and next day appeared before the Magistrate, *and who at that time directed him to file a complaint against petitioners and Homer Maertz for unlawful assembly* (R. 59-60). Just what became of the disorderly conduct charges is not shown; however, the record is clear and concise as to the fact that the witness Kellman did not see petitioners distribute any literature, but, notwithstanding, he signed the complaint (R. 60-62). He was not asked anything by the prosecution relative to the nature of speeches made by petitioners, and did not state that the meeting or assembly was unlawful or disorderly.

The People's witness, William Berman, testified he attended the meeting and heard petitioners speak and had seen Exhibits 3, 4 and 5 *but did not associate petitioners with distribution of the literature,* nor was he asked one question by the prosecution about speeches of petitioners.

The last witness to testify for the People was Patrolman Henry Siegrest, and who took stenographic notes of the meeting. The only disorder observed by this witness was that of "several school children in the back who were shouting" (R. 76), and two service men were arguing. He stated that he saw People's Exhibits 3, 4 and 5 distributed from bags by one Charles Smith, but not by any of the defendants (R. 75). Notwithstanding the fact that the witness Siegrest took notes of the meeting and read them into the record and had every opportunity to hear and observe what went on, ironically however, *the prosecution failed to ask him a question relative to the speeches made by petitioners.*

The only witnesses offered by defendants were Fortuna Adess (R. 81), an employee of the New York Public Library, and who identified People's Exhibit 5, and testified that a copy of the same was on file in said library (R. 84), and Captain Samuel J. Mooney, Commanding Officer of the 105th Police Precinct (R. 87). This witness testified he attended the meeting and made no arrests (R. 89) and that there was nothing which occurred that he would call a real disturbance (R. 91). He further stated there was no violence (R. 90) or injury to person or property.

The case was heard by three Judges of the Court of Special Sessions, Queens County, New York State, and who found all three defendants guilty. Following convictions, petitioners were sentenced to six months' imprisonment, on February 28, 1946; that a Motion for new trial predicated on newly discovered evidence was denied on April

26, 1946, and an appeal taken to the Supreme Court, Appellate Division, Second Department, and judgments of the Court below were affirmed June 24, 1946. The right to carry their appeal to the New York State Court of Appeals was denied petitioners on August 23, 1946. During the period of confinement, following imposition of sentence, petitioners made effort to obtain bond, and which was denied, and they were released from confinement July 26, 1946, approximately twenty-seven days prior to August 23, 1946, and on which date the right to carry their appeals further was denied.

Jurisdiction

Jurisdiction is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Section 347.

Questions Presented

1. Has the case become moot, because of the fact petitioners were confined in jail serving the sentences imposed by the trial court, and have now been released?

2. Were petitioners afforded protection under their constitutional guarantee of freedom of speech and right to peaceably assemble?

3. Did the evidence produced by the People of the State of New York support the charge of unlawful assembly?

4. Did the distribution of literature at the meeting tend towards or cause a breach of the peace?

5. Did the trial court err in denying petitioners' motion for a new trial and should they have been granted leave to carry the case to the New York State Court of Appeals?

Reasons for Granting the Writ

1. Case is not moot, notwithstanding confinement of petitioners during term of sentence, in that at all times an effort was made to have the Court release them on bond, during pendency of motions and appeal, and the right to appeal to the New York State Court of Appeals was not denied until August 23, 1946, twenty-seven days after petitioners had been released.

2. The evidence offered by the People of the State of New York clearly showed a purposeful attendance at the meeting by certain witnesses who appeared for the State.

3. The conviction of petitioners was in violation of their statutory and constitutional rights involving the freedom of speech and right of peaceable assembly.

4. The People of the State of New York failed to prove that any act allegedly committed by petitioners breached the peace or caused an injury to any person, persons or property.

Prayer for Writs

Wherefore, petitioners pray for writs of certiorari to be issued under the seal of this Court directed to the Supreme Court, Appellate Division, Second Department, State of New York, commanding that court to certify and send to this Court all proceedings in the instant case, so that the cause may be reviewed and determined by this Court, and that the judgments of the Supreme Court, Appellate Division, Second Department, State of New York, may be reversed and petitioners granted such other and further relief as may to the Court seem proper.

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SUPREME COURT OF THE UNITED STATES

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vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

Petition to which this brief is attached sufficiently states the facts that appear material to a consideration of the questions presented.

Specification of Errors Assigned

1. The convictions were contrary to the evidence, the weight of the evidence and the law.

2. The trial court erred in not holding the arrest of petitioners as being in violation of their constitutional and statutory rights.

3. The trial court erred in not finding in favor of petitioners on the grounds that the evidence presented by the People failed to support the charges.

4. The trial court erred in not granting the motion for new trial based on newly discovered evidence.

5. The Supreme Court, Appellate Division, State of New York erred in not reversing the finding of the court below.

6. Petitioners should have been granted leave to appeal their convictions to the Court of Appeals, New York State.

Summary of Argument

1. Case is not moot, notwithstanding confinement of petitioners during term of sentence, for at all times an effort was made to secure bond on appeal, and during pendency of motions filed; that they should be allowed to clear their names, and be protected from what is contended to have been erroneous convictions.

2. The People of the State of New York failed to prove any act or acts alleged to have been committed by petitioners were in violation of Section 2092, Sub. 3, of the Penal Law of the State of New York, entitled "Unlawful Assemblage."

3. The convictions were in violation of petitioner's statutory and constitutional rights involving freedom of speech and right of peaceable assembly.

4. The trial court should have granted the motion for a new trial, and petitioners should have been granted leave to carry their appeal to the Court of Appeals for the State of New York.

Argument

1. Case is not moot, notwithstanding confinement of petitioners during term of sentence, for at all times an effort was made to secure bond on appeal, and during pendency of motion filed; that they should be allowed to clear their names, and be protected from what is contended to have been erroneous convictions.

Preliminary to argument on the merits of petitioner's contentions, counsel feels that the question should be discussed as to whether the instant case is moot, and particularly in light of the case of *Rosario St. Pierre* v. *United*

States, reported in 319 U. S. 41, 87 L. Ed. 199, in which this Honorable Court held the same to be moot because of petitioner's service of sentence there was no longer a subject matter on which the judgment of the Court could operate. This Court further stated:

> "The sentence cannot be enlarged by this Court's judgment, and reversal of the judgment below cannot operate to undo what has been done or restore to the petitioner the penalty of the term of imprisonment which he has served."

To the contention that a "*reversal of the judgment below could not operate to undo what has been done,* we most respectfully disagree. It is urged that a defendant in a criminal case should be afforded every opportunity of review if he is convicted so that he may have the opportunity to clear his name and reputation if the conviction be erroneous. *Petitioners aver their case merits review.*

Following imposition of sentence, bond was sought and denied (R. 157), and efforts were continued to obtain bond during the pendency of motions filed and the appeal taken. It is conceded no application was made to this Court for a stay or supersedeas, but it is most respectfully urged that fact should not preclude the right of review if the facts of the case merit it.

Many years ago it was said by Mr. Justice Holmes, in the case of *Commonwealth* v. *Fleckner,* 167 Mass. 13, 44 N. E. 1053:

> "We should be slow to suppose that the legislature meant to take away the right to undo disgrace and legal discredit of a conviction * * * merely because the wrongfully convicted person had paid his fine or served his sentence."

There are many instances that could be cited involving convictions subjecting a defendant to disgrace and legal

discredit where the sentence imposed is so brief, bond denied, that would render a great hardship and perhaps an impossibility to make a request to this Court for a stay or supersedeas prior to expiration of sentence.

In the case of *Hanback* v. *District of Columbia*, decided by the Municipal Court of Appeals for the District of Columbia, 35 A. 2d 189, the majority opinion denied the petitioner the right of review because the fine imposed by the trial court had been paid. The dissenting opinion of Judge Cayton, now Chief Justice of that court, relative to the foregoing question in part stated:

> "It may be said that he should have refused to pay the fine and when he found himself in jail, instituted habeas corpus proceedings to test out the legality of his detention. But it is utterly unreasonable to require such an elaborate, expensive procedure in a case involving a mere local ordinance. He had the right to come to us for a disposition of his appeal. What, then, was his alternative? Only to pay the fine and that he paid it under compulsion can hardly be doubted."

American Jurisprudence, Vol. 2, Appeal and Error, Section 232 in discussing the subject says:

> "The decisions which have passed on the effect of the serving of the full term of a sentence of imprisonment on the right of a defendant to a review of his conviction are in conflict, some Courts holding that serving of the sentence operates as a waiver of the right of appeal on error proceedings, *while others have reached the opposite conclusion.*"

In the case of *Hartwell* v. *United States*, 107 F. (2d) 359, it was held:

> That payment of a fine did not work an abandonment of appeal from conviction for making a false statement with intent of influencing the action of the Federal

Housing Administration and using mails to promote fraud.

Further authorities in support of the contention, that petitioners having completed the term of sentence, or paid a fine imposed, should have the right of review by a higher Court, are herewith submitted. In the case of *Roby* v. *State*, 96 Wis. 667, 71 N. W. 1046, the Court said:

> "It appears by the record that the plaintiff in error was sentenced to one year's imprisonment in May, 1896, and consequently his term must now have expired. This fact, however, makes no difference with the disposition of this case. A person convicted of a crime may prosecute his writ of error while serving his sentence, and the fact that he may serve out his entire sentence before the decision of his case does not affect his right to a reversal of the judgment if it be erroneous. The mere payment of a judgment in a civil cause does not operate as a bar or waive the right to appeal therefrom.
>
> "The compulsory working out of a judgment in a criminal case does not debar a man from obtaining a reversal of an erroneous conviction, and thus removing the stigma which wrongly rests on his name and reputation."

There is a dictum to the same effect in *Com.* v. *Fleckner*, 167 Mass. 13, 44 N. E. 1053.

In *State of Indiana ex Rel. Juan S. Lopez* v. *Alvina M. Killigrew, et al.*, Indiana Supreme Court, February 20, 1931, 174 N. E. 808:

> It was held that a defendant who had satisfied the judgment against him by paying the fine and serving the 30-day sentence imposed could, nevertheless, upon the ground of newly discovered evidence, procure by writ of error coram nobis a review of his conviction: the court saying, in substance, that by discharging the judgment, he had not waived any right to have a retrial,

> that his right to clear his name was sufficient justification for a new trial * * *.

In the case of *District of Columbia* v. *Gardner*, reported in 39 Appeals D. C., page 389, the United States Court of Appeals refused to dismiss an appeal where a fine had been paid by a defendant to escape the alternative penalty of imprisonment, and stated:

> "It is to be presumed that the fine was immediately paid to escape the alternative penalty of imprisonment, and was received by the proper officer of the Court in the performance of his duty under the judgment. It does not appear that it was paid to, or accepted by, the District of Columbia so as to work a discharge from all the consequences of the judgment * * *."

It is accordingly contended that from time of conviction up to date of release from prison, petitioners through their counsel have constantly made every effort to obtain their release on bond, pending a motion for new trial, appeal to the Supreme Court, State of New York, and subsequent effort for right to appeal to the New York State Court of Appeals, and which right was not denied until August 23, 1946, twenty-seven days after their release from prison. At all times there was the possibility of a new trial being granted, or a reversal by the Appellate Court, and petitioners feel, that support should be given their contention, that service of sentence being compulsory, had the case been reversed, the time spent in jail would have been an unjust hardship.

It is earnestly advanced, that the fact that sentence has been served, should not act as a bar to a review by this Honorable Court, if otherwise the case would be admitted for consideration on the merits of the argument to follow.

2. The People of the State of New York failed to prove any act or acts alleged to have been committed by petition-

ers were in violation of Section 2092, Sub. 3, of the Penal Law of the State of New York, entitled "Unlawful Assemblage".

Viewing the charges in the Information, and the evidence produced by the People at the trial in the most favorable light to the prosecution, it must be conceded that the only act that took place at the meeting that might be interpreted as tending towards a breach of the peace was the distribution of literature by someone during the course of the gathering. The literature distributed by someone was unquestionably unfair and derogatory towards a particular faith, still the evidence failed to support the charge that the petitioners distributed the same or were directly associated with such distribution. A review of the record clearly indicates it did not tend towards, nor did it create a disturbance as charged in the Information, which in part read as follows (R. 4):

> "The three defendants acting together and in concert on or about October 6, 1945, in the County of Queens did unlawfully assemble and did attempt or threaten an act tending toward breach of the peace or an injury to a person or persons and property" • • •

Considering the fact that the only possible act, so far as the record reveals that could possibly fall within the scope of the charges contained in the Information, was the distribution of this certain literature, and which it is again repeated *did not cause or create an act or acts contemplated by the statute on which the Information was based.*

In the case of *Dearborn Publishing Co.* v. *Fitzgerald*, 271 F. 479, it was held that the sale of a newspaper containing articles attacking the Jews as a race cannot be prohibited on the streets of a city, under an ordinance forbidding the sale of *publications tending to promote breaches of the peace, since it cannot be assumed that members of*

that race will resort to violence to stop the sale, or that others will be thereby incited to commit violence against the Jews.

Petitioners contend that the above citation is in point with the facts in the instant case. The record fails to indicate a breach of the peace was created as result of said meeting, or that distribution of the literature did, or might, create a subsequent breach of the peace. The only testimony associating petitioners with the literature was that of People's witness Isaac Weinstock, and which witness on cross examination admitted his attendance at said meeting was purposeful as result of a call sent out (R. 64). He further testified seeing both petitioners take People's Exhibits 3, 4 and 5 from bags and give them out for distribution. The foregoing testimony was clearly insufficient to overcome the other testimony of the People's witnesses, Casimir Daniel Kurts, Joseph A. G. Kellman, Lt. Col. William Berman and Patrolman Henry Siegrist. The foregoing witnesses had every opportunity to hear and observe the speeches and actions of petitioners during the course of the evening, and yet they totally failed to associate either Kurt Mertig or Ernest Elmhurst with either handling or distributing the pamphlets. It is quite significant to note from the record that all the People's witnesses purposely attended the meeting for the opportunity of hearing and witnessing the proceedings. Patrolman Siegrest, a police officer, could not be considered as anything other than a neutral witness, and made stenographic notes while in attendance (R. 74), but it is a fair inference from a review of the testimony that both the People's witnesses, Kellman and Berman, were hostile to petitioners, and had petitioners in any manner or form been associated with the handling or distribution of the literature in question, or their speeches been of an unfair or inflammatory nature, both witnesses

would have most certainly heard the same, and so testified in support of the *People's* case.

So there can be no misunderstanding, counsel does not wish to be understood as vouching for the truth of any allegation set forth in People's Exhibits 3, 4 and 5, or as believing there was ever any justification, or reason for their publication or distribution. Assuming, however, that the pamphlets were as charged in the Information, the record fails to disclose that their distribution did *threaten or tends towards a breach of the peace, at the particular meeting, or did they cause a breach at a later time.*

As to the charge that the pamphlets were criminally libelous, we refer to the ruling of the Court of General Sessions, New York City, in the case of *People* v. *Edmonston*, 168 Misc. 142, and which held that there can be no such thing as criminal libel of people of a particular faith. The record clearly indicates there was no act or behavior on part of petitioners that threatened or tended towards a breach of the peace. The testimony of People's witness, Joseph A. G. Kellman, stated the only disorder that might be inferred was an argument between defendant Maertz, and a Mr. Ginsberg (R. 57), both parties being charged with disorderly conduct. Just where the foregoing disorderly conduct actually took place is not clear, so it would be prejudicial and unfair to infer that it occurred at the meeting in view of the testimony of witnesses, both for the prosecution and defense, when questioned about disturbances. The witness Kellman did not state that either of petitioners were associated or connected with any of People's Exhibits 3, 4 and 5, but he did testify as to details relating to the arrests of Maertz and Ginsberg, and to the manner in which the subsequent charges were placed against Mertig and Elmhurst. Testimony of Kellman clearly reveals that defendant Maertz was not arrested by an officer of the law

stationed at the meeting, but by Mr. Ginsberg (R. 57), a private citizen, and which in part was as follows:

Q. Who made the arrest? A. Mr. Ginsberg with the assistance of a police officer.

Q. Had you made application yourself to the police for the arrest of Mr. Maertz? A. No, sir.

Q. Had you made application to the police for the arrest of any of the speakers at the meeting? A. No, sir.

Q. It was Mr. Ginsberg that made the arrest on the charge of disorderly conduct? A. Yes, sir (R. 58).

* * * * * * *

Q. Did you the following day go to the Queens Felony Court, that is Sunday, October 7th? A. Yes, sir.

Q. And Mr. Maertz was arraigned there before Mr. Justice D'Andrea on the charge of disorderly conduct, isn't that correct? A. That is correct, sir.

Q. Then it was, sir, when you made your first appearance into the Felony Court that only two arrested as a result of the meeting was Mr. Maertz, charged with disorderly conduct by Mr. Ginsberg, and Mr. Ginsberg charged with disorderly conduct on the charge of or the complaint of Mr. Mertig, is that right? A. That is correct (R. 59).

* * * * * * *

Q. Then, sir, after the arraignment and pleading of the disorderly conduct charge on Sunday morning, October 7th, were you directed by Magistrate D'Andrea to draw a charge of inciting a riot, yes or no? A. To the best of my recollection that was no.

Q. No. And, sir, you signed a complaint in the Felony Court that morning charging each one of these defendants with a violation of Section 2092, Subdivision 3, Unlawful Assemblage, is that correct? A. That was my recollection what the Judge ordered, sir.

Justice Hackenburg: The Judge ordered what?

The Witness: A complaint for Unlawful Assembly (R. 60).

Captain Samuel J. Mooney of the Police Force testified for defendants (R. 90) and was asked on direct examination:

> Q. • • • Was there any violence there? A. There was no violence.
>
> Q. Was there any disturbance there, officer? A. Interruptions and heckling.
>
> Q. Heckling. Was there any disturbance there, officer?
>
> • • • • • • •
>
> A. There was nothing I would call a real disturbance.

The witness further testified there were *no injuries to person or property* (R. 91, 92), and which are elements of the statute. Can it be reasonably argued that the evidence offered on behalf of the People was sufficient to carry the burden of proof as required in all criminal cases, and such for the trial Court to have found petitioners guilty beyond a reasonable doubt? We think not.

The presence of thirty-three policemen was in itself significant of the fact that the meeting was no secret and notice had been given, and they were not in any manner obliged to interfere with the progress of the meeting or make an arrest. The foregoing is indicative that nothing occurred that *tended toward or did actually create a breach of the peace, nor was there any evidence produced by the People to show injury to a person, persons or property.*

Police are guardians of the public order and it is their duty to prevent disorder. *People* v. *Nixon,* 248 N. Y. 182.

While there was, no doubt, great feeling on the part of certain persons attending the meeting, heckling and booing

on the part of others, can it be said that the record shows it to have been disorderly, or tending towards a breach of the peace, or causing an injury to persons or property, or that any unlawful act occurred? Heckling and booing, while not in keeping with good order, appear to have become a common practice and appear at many orderly meetings, or forums where the topics of the day are argued and discussed, still it cannot be said that such tactics on the part of certain persons create or cause a breach of the peace or an unlawful assemblage.

It is a very strange coincidence that defendant Maertz and Mr. Ginsberg, each being charged with disorderly conduct, appeared before the Magistrate to answer such charges, yet the record fails to disclose what happened to said charge and countercharge. The record, however, does disclose that the next day at the instance of the Magistrate charges were preferred against the petitioners and one Maertz, and for which they now stand convicted. No charges were placed against Mertig or Elmhurst until they appeared in Court. Neither were involved in any way or charged with disorderly conduct, or any altercation or disturbance at, or after the meeting. A careful reading of the record indicates that neither petitioner did any act that warranted preferring of the charge with which they were convicted.

3. The conviction was in violation of petitioners' statutory and constitutional rights involving freedom of speech and right of peaceable assembly.

Section 2092, Sub. 3 of the Penal Law of the State of New York, the violation of which petitioners were charged, is entitled "*Unlawful Assemblage.*" The First Amendment to the Federal Constitution provides that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the Government for a redress of

grievances. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. The power of the State to abridge freedom of assembly is the exception rather than the rule. *It must find justification in a reasonable apprehension of danger.* It goes without argument that the rule is firmly settled that the right of freedom of speech and of the press, which is protected by the First Amendment from the abridgment of Congress, is among the fundamental "*rights*" and "*liberties*" protected by the due process law of the Fourteenth Amendment from impairment by the States.

Consistently with the Federal Constitution, peaceable assembly for lawful discussion *cannot be made a crime.* The holding of a meeting for peaceable political action cannot be proscribed nor can those who assist in the conduct of such meetings be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; *not as to the relations of the speakers, but whether their utterances transcend the bounds of freedom of speech which the Constitution provides.*

In the instant case, the record is silent as to whether the speeches made by Mertig or Elmhurst at the meeting transcended the bounds of freedom of speech, and it can only be inferred they did not, for if petitioners' speeches had been in violation of that right, the witnesses testifying for the People would have so stated. The New York Penal Law, Section 2092, states that the section shall not be construed so as to prevent peaceable assembling of persons for lawful purpose or protest. The People introduced in evidence the call for the meeting entitled "My Country" identified as Exhibit 1. The document does not appear to contain a threat or an attack on people of any faith, and

in that the document was introduced as an exhibit by the People as part of their case precludes any contention that the meeting was called for any purpose other than therein stated.

Article 1, Section 8, of the New York State Constitution reads as follows:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Blackstone defines "Unlawful Assemblage" as: "When one or more persons assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren for the game therein, and fail without doing it or make any motion toward it."

In the case of *Shields* v. *State*, 204 N. W. 486, 187 Wis. 48, 40 A. L. R. 945, it was held that a parade of the Klu Klux Klan, the members of which conducted themselves in orderly and peaceful manner, was not "an unlawful assembly," which is an assembly of three or more persons who with intent to carry out any given purpose assemble in such manner as *to cause persons in the neighborhood to fear that they will disturb the peace tumultuously, or provoke other persons to disturb the peace tumultuously*, or otherwise unlawful, in absence of ordinance prohibiting parades.

In the case of *Aron* v. *City of Wausau*, reported in 74 N. W. 354, 98 Wis. 592, 40 L. R. A. 733, it was held under Rev. St. 4511, an "unlawful assembly" is defined as a meeting by three or more persons in a *violent manner to do an unlawful act*. A distinguished text writer, adopting the definition taken from the brief report of the English Commissioners of 1879, says: "An unlawful assembly is

an assembly of three or more persons, who, with intent to carry out any common purpose, assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood *to fear,* on reasonable grounds, that the persons so assembled *will disturb the peace tumultuously.*"

Can it be said that the record in the present case reveals that the meeting attended by petitioners and others was such as to cause persons in the neighborhood to fear that the peace would be disturbed tumultuously, or that it might provoke other persons to disturb the peace tumultuously, or that the meeting was conducted in a violent manner to do an unlawful act? The record speaks for itself, it was conducted in an orderly fashion and the peace was not breached.

In the case of *People* v. *Judson,* N. Y. 11 Daly 1, 83, it was held that an unlawful assembly is where three or more persons assemble with an intent to "commit violence upon person or property, to resist the execution of the laws, to disturb public order, or for the perpetration of acts inspiring public terror or alarm."

If the foregoing definition of unlawful assembly is to be accepted, the meeting complained of for which the petitioners were convicted was, according to the record, mild of nature, and embodied no act in violation of the statute with which they were charged.

In the case of *People* v. *Most,* 64 N. E. 175, 171 N. Y. 423, 58 L. R. A., it was held that a "breach of the peace" is an offense well known to the common law. It is a disturbance of public order by an act of violence, or by an act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.

It cannot be contended that any act at the meeting in the

instant case met any of the tests advanced in the description as aforesaid of a "breach of the peace."

The language of Mr. Justice Roberts in the case of *Cantwell* v. *State of Connecticut*, 310 U. S. 296, is quite significant. The Court there pointed out that the common law breach of the peace includes acts and words likely to produce violence in others but the State may not unduly suppress free communication of news, religious or other, under the guise of conserving desirable conditions. The Court further said that while the matter made public by the defendants "not unnaturally aroused animosity," considered in the light of constitutional guarantees," it raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense" of inciting a breach of the peace.

It is most earnestly urged that the conviction of the two petitioners, predicated on an alleged act that threatened or tended towards a breach of the peace, or an injury to person or property, based on the record now before this Honorable Court, violated the constitutional guarantee of freedom of speech and the right to peaceably assemble. It is contended by petitioners that the word "peace" as used in law in this connection means the tranquility enjoyed by citizens of a community where good order reigns among its members, and which is the natural right of all persons in political society. There is no evidence in the instant case that the peace enjoyed by persons in the community where the meeting in question was held suffered a disturbance as contemplated by the Information.

In the case of *Marsh* v. *Alabama*, reported in Law Ed. Advance Opinions, 1945-1946, Vol. 90, No. 6, page 231, Mr. Justice Black in his opinion stated:

> "As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and

we must in all cases 'weigh the circumstances and appraise the reasons' in support of the regulation of those rights.''

Citing *Schneider* v. *Irvington*, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146, it must be conceded that the sole charge against petitioners was the uncalled for distribution of literature at the meeting, and with which only one witness associated them; but, notwithstanding the nature of the same, it is most earnestly urged, it failed to create a breach of the peace at the meeting or subsequently thereto, and, in the light of the authorities cited, it cannot be assumed that it might be calculated to do so at a later date.

4. The Court below should have granted petitioners' motion for a new trial and the right to appeal to the New York State Court of Appeals.

It is inconceivable that petitioners were literally obliged to rush into the trial in which they were named as defendants without any prior knowledge of the charge until they appeared in Court for the trial of Homer Maertz and Mr. Ginsberg for disorderly conduct, and at which time the charge against them was ordered by the Magistrate before whom they appeared. Had petitioners had the opportunity to properly prepare their defense, they would have had present witnesses to testify in their behalf who later subscribed to affidavits in support of the motion for a new trial on newly discovered evidence (R. 12). Can it be doubted, but what all affiants would have so testified at the trial had they been properly notified, and had petitioners had a reasonable opportunity to have presented them as witnesses in their behalf. It is respectfully submitted, the Motion for New Trial was properly prepared and filed, and all supporting exhibits met the necessary legal tests.

It is urged that a new trial should have been granted and in lieu thereof the right of appeal should have been afforded

petitioners to carry their grievances to the New York State Court of Appeals.

Conclusion

Wherefore, the premises considered, it is respectfully contended that the Court of Special Sessions of the City of New York erred in finding petitioners guilty of violation of Subdivision 3 of Section 2092 of the Penal Law of State of New York; that the Supreme Court, Appellate Division, Second Department, erred in not reversing the findings of the Court below, and the right of appeal to the New York State Court of Appeals should have been granted.

Respectfully submitted,

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(All Emphasis Supplied.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 804 and 805

KURT MERTIG and ERNEST ELMHURST

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

APPLICATION FOR RECONSIDERATION OF PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF.

P. Bateman Ennis
Counsel for Petitioners

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To the Honorable Justices of the Supreme Court of the United States:

The petition for writs of certiorari to the Supreme Court, Appellate Division, State of New York was denied by this Honorable Court on February 10, 1947. The herein application for reconsideration of said petition is presented by authority of Rule 33, of the Revised Rules of the Supreme Court of the United States.

STATEMENT

A copy of said petition filed herein was served upon the People of the State of New York, but no answer was filed in response thereto. On February 10, 1947, counsel for petitioners was advised by letter that:

> "The Court today denied the petition for writs of certiorari in the cases of Mertig, et al. v. People of the State of New York, Nos. 804 and 805, October Term, 1946."

There being no opinion or memorandum as to why the Petition was denied, petitioners are taking the liberty to assume said denial of review was predicated on the fact that they had served their sentence, and as result thereof the case became moot and not subject to review. At the outset of petitioner's brief seeking a writ of certiorari, the case of Rosario St. Pierre v. United States, 319 U. S. 41, 87 L. Ed. 199 was referred to, and in which case this Honorable Court held the same to be moot because of petitioner's service of sentence there was no longer a subject matter on which the judgment of the Court could operate. The several authorities cited in said brief as to petitioners' contention as to why the instant case should be the subject of review are referred to by incorporation in the intsant application, however, since the preparation and filing of said petition, the case of *Fiswick v. United States*, reported Vol. 91-No. 3 Law ed. Advance Opinions of this Honorable Court has been called to petitioners' attention, and to which case this application is directed.

ARGUMENT

The only portion of the aforementioned case which petitioners wish to discuss as applicable to their contention is headnote 8, the syllabus reading as follows, page 184:

> "Appeal 1662—serving of sentence as rendering appeal moot.
>
> 8. The fact that one convicted of crime has served his sentence does not render an appeal moot where the conviction is attended with other consequences, such as vulnerability to a deportation proceeding, possible denial of naturalization, and the disabilities of a felon whereby he may lose certain civil rights; and it is immaterial that such person, having served his sentence,

may not be resentenced on a new trial and that if his conviction is reversed he thereby escapes deportation."

The opinion of Mr. Justice Douglas relating to Headnote 8, reads as follows:

"A further question remains. As we have noted, Fiswick was sentenced to imprisonment for 18 months. No fine was imposed. It now appears that he has served his sentence. Accordingly, it is suggested that the cause is moot and the writ of certiorari should be dismissed as to him. We followed that procedure in St. Pierre v. United States, 319 U. S. 41, 42, 87 L. ed 1199, 1201, 63 S. Ct. 910, saying that since the sentence had been served, "there was no longer a subject matter on which the judgment of this Court could operate." We added, however, that the petitioner had not shown that "under either state or federal law further penalties or disabilities can be imposed on him as result of the judgment which has now been satisfied." P. 43.

The situation here is different, Fiswick is an alien.

An alien sentenced to imprisonment for one year or more "because of conviction in this country of a crime involving moral turpitude" is, unless pardoned, subject to deportation if the crime was committed within five years after the alien's entry into the United States . . . The conspiracy with which Fiswick is charged was formed and executed within that five year period as his last entry was in 1937. . . .

Moreover, other disabilities or burdens may flow from the judgment, improperly obtained, if we dismiss the case as moot and let the conviction stand. If Fiswick seeks naturalization, he must establish that during the five years immediately preceding the date of filing his petition for naturalization he "has been and still is a person of good moral character." . . . And even though he succeeded in being naturalized, he

> would unless pardoned, carry through life the disability of a felon; and by reason of that fact he might lose certain civil rights. Thus Fiswick has a substantial stake in the subject of conviction which survives the satisfaction of the sentence imposed upon him. In no practical sense, therefore, can Fiswick's case be said to be moot . . . To dismiss his case as moot would permit the Government to compound its error at Fiswick's expense. That course does not comport with our standards of law enforcement. Reversed."

Both petitioners Kurt Mertig and Ernest Elmhurst are naturalized citizens of the United States, and we do not contend that the conviction of the Penal Law of the State of New York, Section 2092, Sub. 3 entitled "Unlawful Assemblage" being a violation of a misdemeanor only could bring about denaturalization proceedings, yet we submit any conviction such as the foregoing, misdemeanor or otherwise, might in some manner or form place the petitioners in such an unfavorable light to make them subject to further investigation by the authorities that might result in the bringing of denaturalization proceedings, and no matter how far fetched the theory might be considered, there is that possibility. The petitioner Ernest Elmhurst, is named as a defendant in the case of United States vs. Joseph McWilliams et al, Criminal Action 73-086 brought in the District Court of the United States for the District of Columbia. A conviction on the charges alleged in the foregoing case would no doubt serve as a basis for denaturalization, and deportation, and while said indictment is far removed from the "Unlawfully Assembly" charge, we submit that the combination creates an atmosphere derogatory not only to the petitioner Elmhurst, but to his co-defendant in the Unlawful Assembly Case, Mertig.

We most earnestly urge that the compulsory working out of a judgment in a criminal case does not debar a man from obtaining a reversal of an erroneous conviction, and thus removing the stigma which wrongly rests on his name and reputation. It is not too far removed to suppose, that if any time in the future either of petitioners should be so circumstanced as to be parties to a denaturalization proceeding, that the herein conviction from which they are seeking a reversal in this Honorable Court would be brought up, and in conjunction with possible other charges so presented, might provide the weight to an unfavorable finding in such proceedings. It is conceded that all of the foregoing argument is advanced on pure speculation, still we respectfully submit in the case of Fiswick v. United States, there was no definite assurance that if the conviction stood that the authorities would have taken the necessary steps to deport Fiswick.

CONCLUSION

In conclusion, we urge this Honorable Court to reconsider the petition filed herein, and reverse the findings of the Court below.

Respectfully submitted,

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